IN THE

Supreme Court of the United States

October Term, 1978

No. 78-912

DR. M. OSKOUI,

Petitioner,

vs.

THE UNIVERSITY OF PITTSBURGH; WESLEY POSVAR, Ph.D.; NATHAN J. STARK; JOSEPH A. BIANCULLI, Ph.D.; JOSEPH P. BUCKLEY, Ph.D.; BALWANT N. DIXIT, Ph.D.; RHOTEN SMITH, Ph.D.; EDISON MONTGOMERY; FRANCIS S. CHEEVER, M.D.; WILLIAM H. REA; ROGER S. AHLBRANDT; HENRY L. HILLMAN; S. HARRIS JOHNSON, III, M.D.; LEON FALK; C. HOLMES WOLFE, JR.; and HARVEY J. HAUGHTON,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Statement of the Case

Respondents submit that the facts set forth by Petitioner in his "Statement of the Case" are inaccurate and conclusory. Respondents would refer this court to the factual chronology set forth by the lower court in its Opinion of December 15, 1977 which is included in Appendix C of the Petition For Writ of Certiorari at pp. 25-34.

REASONS FOR DENYING THE WRIT

I. The district court's action of dismissing plaintiff's case comported with this court's holding in *National Hockey League v. Metropolitan Hockey Club, Inc.*

Petitioner, Dr. Oskoui, has fabricated factual differences between his case and *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), to persuade this court that the district court expanded *National Hockey League's* holding beyond acceptable limits. On the contrary, the district court's discretionary dismissal of Petitioner's case is clearly sanctioned by *National Hockey League* and Rule 37 of the Federal Rules of Civil Procedure, and there is no reason for this court to review such a "garden variety" application of the rules of discovery.

First, Petitioner is clearly wrong in claiming that his *pro se* status during the last 2½ months of discovery (April 14-July 4, 1977) exempts him from the full force of *National Hockey League's* holding. As this court has stated, the most severe sanctions under Rule 37 may be applied to a *party* who has flouted discovery orders in order to penalize that particular party and deter others from similar conduct.

The existence of counsel is irrelevant so long as the court has found that the party to be punished has indeed exercised a wilfull disregard for the court's authority. The district court determined that Petitioner had ignored at least three orders of court. The Order of March 14, 1977 was defied by Petitioner while he was still represented by counsel, and the orders of April 14, 1977, and June 9, 1977 were flouted by Petitioner beyond the thirty day period granted by the district court for Petitioner to secure substitute counsel. Since the district judge determined that Petitioner had actual knowledge of each of the court's orders and of the scheduled depositions, the

Petitioner's flagrant disregard for these court orders and subpoenas constitutes a knowing and wilfull act of defiance to judicial authority for which the most severe sanctions of Rule 37 should be applied.

Second, Petitioner alleges that he was "misled as to the consequences of his actions," and therefore, the district court should have been "estopped" from dismissing his case. Presumably, Petitioner is referring to the district court's order of June 9, 1977 which did not specifically state that Petitioner's further failure to submit to the taking of his deposition would result in the dismissal of his suit. Any party to litigation must be charged with the knowledge that his flagrant refusal to comply with orders of court may precipitate the dismissal of his case. Furthermore, the June 9, 1977 order of the district court specifically stated that although "the case will not be *dismissed at this time* for Plaintiff's failure to submit to his deposition (emphasis added)," "[p]laintiff shall have no further extensions." (See Appendix E of Petitioner's Petition For A Writ Of Certiorari at p. 40.)

Third, Petitioner argues that his failures to comply with orders of court were excusable, and therefore, there was no wilfullness on his part. This conclusion is specifically rejected by the district court which found that "Plaintiff has engaged in a course of conduct which was calculated to disrupt the orderly progression of this case." (See Appendix C at p. 33 of Petitioner's Petition For Writ of Certiorari).

Petitioner's allegation is based upon his submission to the court of several self-serving letters. These letters set forth various "excuses" for missing prior depositions, and indicated that Petitioner was continuing to look for an attorney beyond the time allotted by the court and would not submit to a deposition until he had secured counsel. Petitioner's

position that he would not be deposed until he had secured new counsel in no way undermines the wilfullness of his refusal to be deposed, since the district court stated that discovery would not be extended beyond July 5, 1977 under any conditions despite Petitioner's frequent requests for more time to secure counsel. Admittedly, Petitioner was compelled to compromise his belief that he should not be forced to submit to a deposition until he had secured alternate trial counsel. However, Petitioner's blind adherence to his beliefs despite contrary judicial decisions and his stubborn refusal to submit to discovery unless conducted under his own terms hardly excused Petitioner from complying with the authority of the court.

Finally, Petitioner avers that the deterrent effect of dismissal emphasized in *National Hockey League* will not be advanced in this case because other *pro se* litigants will not be aware of the consequence of their actions. Not only *pro se* litigants, but all litigants will be "cautioned" by the court's action in this case since all parties are charged with a knowledge of the law and its application to individual conduct. Furthermore, Petitioner is a "seasoned" litigant who has brought at least three separate lawsuits against these respondents alone, and has had the services of at least five different attorneys. Petitioner was well aware of the consequences of his actions since he had suffered dismissal of at least one state court action for refusing to submit to the taking of his deposition.

For the above reasons, the district court's dismissal of Petitioner's action was authorized by the clear language and import of *National Hockey League*, and no unique or unresolved question of law is presented by such dismissal for resolution by this court.

II. Dismissal of Petitioner's case did not constitute a denial of due process.

Petitioner alleges that he was denied due process of law because his failure to comply with the court's orders "resulted from inability despite good faith efforts," *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, and dismissal of his case was therefore, "mere punishment." This allegation is not supported by the record.

The *Societe Internationale* holding is based upon a determination that a party is unable to perform that which the rules of court or specific orders of court demand. "Ability to perform" is the key to any inquiry based upon the *Societe* standard. Petitioner's refusal to submit himself for a deposition was not prompted by inability, but by a steadfast determination to progress with discovery only if discovery was carried out in accordance with Petitioner's own terms.

Furthermore, the court's refusal to allow Petitioner to proceed with discovery after the discovery period had expired and after Petitioner appeared with new counsel, was not a denial of due process under any standard established by this court. The district court had stated to Petitioner in its orders of April 14, 1977 and June 9, 1977 that discovery would terminate on July 4, 1977 despite Petitioner's unofficial requests for further extensions of time to secure counsel. Petitioner's appearance with new counsel *after* the discovery period had ended created no bar to the district court's strict enforcement of the rules of discovery and its prior orders. Petitioner had steadfastly refused to be deposed for the entire course of discovery spanning a period of more than a year and a half, and

the existence of a 2½ month period when Petitioner was acting *pro se* in no way undermined the wilfullness of Petitioner's acts.[1]

III. The district court properly considered Petitioner's motion for recusal.

Petitioner asserts that the lower court "refused to examine its record comments and rulings for evidence of personal bias," and erroneously relied on the "duty to sit" doctrine. Neither of these allegations is correct.

A complete reading of Judge McCune's Memorandum, (Appendix F of Petition For Writ of Certiorari) negates any inference that the lower court did not consider any of the allegations set forth in Petitioner's motion for recusal merely because they concerned actions and comments made in the course of the present action. Rather, the lower court found that Petitioner's affidavit had failed to meet the requirements of legal sufficiency set forth in the applicable case law and statutes. This conclusion is supported by the fact that Judge McCune relied upon the case of *Tenants and Owners v. U.S. Dept. of Housing and Urban Development*, 388 F. Supp. 29 (N.D. Cal. 1972), wherein the court ruled that in the appropriate case, conduct and comments of record could constitute grounds for recusal.

[1] On April 13, 1978 the district court granted Petitioner's counsel leave to withdraw their appearances following the episode of April 7, 1977 in which Petitioner's counsel traveled from Washington D.C. to Pittsburgh for Petitioner's deposition, but Petitioner failed to appear. On April 14, 1977 Judge McCune granted Petitioner 30 days to secure alternate counsel or decide to represent himself. Following this 30 day grace period, Petitioner continued to ignore subpoenas for his presence at depositions and orders from the court that the discovery period would not be extended beyond July 4, 1977.

Appellant also argues that Judge McCune misapplied the standard of review because he relied upon the "duty to sit" doctrine, which Appellant asserts was abrogated by the 1974 amendments to 28 U.S.C. § 455. It appears that the language of § 455(a)[2] has created a greater flexibility in analyzing the facts of particular situations wherein a party moves for recusal. Section 455(a) has been applied to permit recusal where affidavits were held to be insufficient, but where the "total circumstances" presented a reasonable likelihood that an impartial trial could not be held. *United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976), *cert. denied* 429 U.S. 951 (1977); *Webbe v. McGhie Land Title*, 549 F.2d 1358 (10th Cir. 1977); *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976).

While § 455(a) may have expanded the bases for recusal beyond those specifically enumerated in § 455(b), it did not open the door to "wholesale" recusals. There must still be a reasonable basis to support disqualification of a judge under § 455(a), and in the absence of such reasonable basis, recusal is not necessary or proper. A judge no longer has a "duty to sit" simply because his impartiality may be questioned for reasons other than those specifically enumerated in § 455(b)(1), but he still has a "duty to sit" where there is absolutely no basis whatsoever to question his impartiality. Any other holding would plague the judicial system with "judge shopping."

Judge McCune's Memorandum merely reflects the proper standard of review that remains unchanged by the amendments to § 455. Where the complainant's affidavit of bias filed

[2] § 455(a) reads as follows: "Any justice, judge, magistrate, or referee in bankruptcy or the United States shall disqualify himself in any proceeding in which his imparitality might reasonably be questioned."

pursuant to § 455(b)(1) is legally insufficient to form a basis for recusal, and there is no other reason that his impartiality might reasonably be questioned[3], then a federal district judge still has an "obligation to sit."

Conclusion

Petitioner's Petition For Writ of Certiorari has raised no special or important legal issues for resolution by this court, and should be denied.

Respectfully submitted,

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[3] It should be noted that Petitioner never raised 28 U.S.C. § 455(b) as a basis for recusal and has never set forth any reason why Judge McCune's "impartiality might reasonably be questioned" for reasons other than those set forth in his original affidavit which was found to be legally insufficient.